DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
OLLY NEAL, Judge

CA06-292

October 4, 2006

RALPH S. LACOTTS, II AND JON BARTON LACOTTS
APPELLANTS

v.

KELLI KOEN, ET. AL.

APPELLEES

AN APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT
[PR-01-5]

HONORABLE JOHN W. COLE, JUDGE

AFFIRMED

Appellants, Ralph S. LaCotts, II, and Jon Barton LaCotts, bring this appeal from an August 23, 2005, order of the Arkansas County Circuit Court finding that the Last Will and Testament of Clarence Elmer LaCotts, Jr. (Mr. LaCotts) was not ambiguous and that the will did not confer unto appellants an exclusive right to hunt certain property that was devised in the will. On appeal, appellants argue: (1) the trial court's failure to give effect to the prior agreed order was contrary to the doctrine of res judicata and clearly erroneous; (2) the trial court's construction of the will was contrary to the testator's intention and clearly erroneous because the decedent's real property was incorrectly described in the testator's will; (3) the trial court's construction of the will concerning the appellants' right to commercial hunting and use and occupancy of a hunting lodge was contrary to the testator's intention and clearly

erroneous.

Appellants are Mr. LaCotts's grandsons. The appellees are five of his six granddaughters, his daughter Kay Whitcomb, and Mr. LaCotts's estate. Mr. LaCotts died on February 6, 2001. He was survived by Kay Whitcomb, who served as the executrix of his estate, and eight grandchildren.

At the time of his death, Mr. LaCotts owned three separate and distinct tracts of land that, at their simplest, can best be described as: (1) 269.9 acres of duck-hunting property; (2) 38.8 acres that included his home, the home of appellant Ralph LaCotts, II, the home of appellee Kelli Koen, and a duck hunting lodge; (3) a home in DeWitt. The duck-hunting property was in fact two separate tracts of land with the first being a 109.9-acre tract and the second being a 160-acre tract situated immediately south and adjacent to the 109.9-acre tract.

On March 9, 2001, Mr. LaCotts's will was admitted to probate. Paragraph IV of the Will dealt with the disposition of the land. Subparagraph three addressed the disposition of the duck-hunting property and the hunting lodge. It specifically provided:

> I give, devise, and bequeath to my grandchildren, namely, Susan Joy Whitcomb, Eleanor Jane Reynolds, Dikina LaCotts Hoelzeman, Kelli Kristelle Koen, Ralph Sidney LaCotts, II, Jon Barton LaCotts, Summer Nicole LaCotts Boyd, and Lauren Monique Hook, the following described real property, lying in Arkansas County, Arkansas, Southern District, in *fee simple absolute*, *share and share alike*. Provided further, Ralph Sidney LaCotts, II, and Jon Barton LaCotts shall have the right to commercial hunt on said property during their lifetimes and to occupy and utilize the hunting lodge located on said lands during their lifetimes for personal use and in connection with their commercial hunting activities. It is further my request and desire that said Ralph Sidney LaCotts, II, be entrusted with making the necessary decisions in maintaining said property, with *all parties equally sharing in said maintenance and upkeep expenses*.

Legal Descriptions on Exhibit "A" attached hereto and incorporated by reference.

(Emphasis added.) Exhibit A described the property as follows:

> Fraction Northeast Quarter of the Northwest Quarter, Section Three (3), Township Five (5) South, Range Four (4) West, containing approximately 69.90 acres and the Southeast Quarter of the Northwest Quarter of Section Three (3) Township Five (5) South, Range Four (4) West, containing 40 acres, more or less according to U.S. Gov. Survey.
>
> South Half of the Northeast Quarter of the Southwest Quarter of Section 33, Township 4 South, Range 3 West, except one-half acre in a square in the Northeast Corner thereof.
>
> Lot 49 in the North Half of the Northwest Quarter of the Southwest Quarter of Section 33, Township 4 South, Range 3 West, and more particularly described in Record Book 35, Page 183, in the Office of the Recorder of Deeds for the Southern District of Arkansas County, Arkansas.
>
> A right-of-way across the North Half of the Northeast Quarter of the Southwest Quarter of Section 33, Township 4 South, Range 3 West, and more particularly described as follows: Beginning at the Southwest Corner of the North Half of the Northeast Quarter of the Southwest Quarter of Section 33, Township 4 South, Range 3 West, thence North 70 Feet on the West line of the North Half of the Northeast Quarter of the Southwest Quarter of said Section, Township and Range; thence Southeast to a point on the South line of the said tract which is 70 Feet East of the Southwest Corner thereof; thence West to the Southwest Corner, containing 0.5 acre, more or less, such easement privilege being sufficient to allow any owner of Lot 49 of the North Half of the Northwest Quarter of the Southwest Quarter of Section 33, Township 4 South, Range 3 West to cross the Southwest Corner of the North Half of the Northeast Quarter of the Southwest Quarter of the said Section, Township and Range.
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> Lots 17 and 18, Rothenhoffer's Addition to the Town, now City of DeWitt, Arkansas. Platted out of part of the Southeast Quarter of the Southwest Quarter of Section 33, Township 5 South, Range 3 West, Southern District of Arkansas County, Arkansas.

All the grandchildren, except appellee Eleanor Reynolds, entered their appearance in

the probate proceedings, waived notice as to hearing the petition to probate or other matters presented to the court. They also consented to the court deciding such matters and entered their appearance for all purposes in the proceedings.

It was later discovered that Exhibit A failed to include the 160-acre tract. A dispute arose between appellants and appellee Eleanor Reynolds concerning the use of the duck-hunting property. On April 18, 2002, an agreed order was entered in which appellants, appellee Reynolds, the estate, and the executrix of estate recognized that the correct description of the duck-hunting property included the 160-acre tract and that the correct description[1] should be included in paragraph four, subparagraph three of the will. In the agreed order, appellee Reynolds and Susan Whitcomb agreed to sell their one-eighth interest in the estate, including their interest in the 160-acre tract.

On March 5, 2003, appellants filed a petition for partial distribution of the estate. That same day, an order granting the petition was entered.

Appellees, Lauren Hook, Dikina Hoelzeman, Kelli Koen, and Summer Boyd, subsequently revoked their waivers of notices of hearing. They filed petitions to set aside the partial distribution and on February 9, 2004, appellee Kelli Koen filed a petition for construction of Mr. LaCotts's will. Based on the record before us, we must assume that appellees Hook, Hoelzeman, and Boyd all joined in the petition. In the petition, it was argued that because the 160-acre tract was not described in Exhibit A to the will, it must pass

[1]In the documents filed in conjunction with this case, the parties describe the 160 acres as "The Southwest Quarter of Section 3, Township 5 South, Range 4 West."

under the residuary clause of paragraph five[2] of the will and not paragraph three, that appellants did not have exclusive hunting rights in the 160-acre tract, and that the rights granted to appellants under paragraph four, subparagraph three, were not possessory rights.

Appellants filed a motion to dismiss the petition and a response to the petition. In both, they pointed out that appellees had previously entered their appearance and waived all further notice of hearing. They argued that based on appellees' waiver, previous orders were entered and the doctrine of res judicata now barred construing the will.

In their response, appellees stated that their waivers were general in nature and were intended only to allow the executrix to tend to the routine matters of the estate. They asserted that the waivers were not intended to allow the executrix and appellants to present an ex-parte partial distribution order to the court that substantially impaired their rights to the property. Appellees also asserted that the doctrine of res judicata did not apply.

A hearing on the petition to construe the will was held on July 15, 2005. During the hearing, appellants offered evidence as to what they believed Mr. LaCotts's true intentions were. At the close of all the testimony, the trial court stated the following from the bench:

> I'm not considering what Mr. LaCotts may have intended. That's not the law. I'm considering what he said. And what he said is unambiguous and unequivocal.

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[2]Paragraph five provided:

> I give, devise, and bequeath all the rest, residue and remainder of my property, whether real, personal, or mixed, to my daughter, Kay Whitcomb, and my grandchildren, Susan Joy Whitcomb, Eleanor Jane Reynolds, Dikina LaCotts Hoelzeman, Kelli Kristelle Koen, Ralph Sidney LaCotts, II, Jon Barton LaCotts, Summer Nicole LaCotts Boyd, and Lauren Monique Hook in fee simple absolute, share and share alike.

And he limited the hunting rights – – he limited this bequeath, Paragraph II, to the 109 acres.

. . . .

There is some ambiguity with the question of the lodge, because he refers to it as "the lodge located on said lands," presumably referring to the lands described in Paragraph III. But as it turns out, that lodge is on neither the 109 acres or the 160 acres, but is on the land where he resided, the thirty-eight or forty acres, I believe, is what Mr. LaCotts, the witness, testified to. That makes it clear that there is no ambiguity with reference to the 160 acres. One hundred and nine acres is all that was devised in Paragraph III, with the exception of the lodge.

Even though there is some ambiguity as to his described location of the lodge, it is clear to the court that he intended that [the] lodge be the object of lifetime use by [appellants,] for their personal use and in connection with their commercial hunting activities.

Now, I can't tell you much more about it than that. I think that I can safely say that would include by necessity ingress and egress, enough property around the lodge to park the cars of the users of the lodge, commercial or otherwise; and enough area around the lodge to store the equipment in connection with commercial hunting that is necessary, such as boats, blinds, what – – whatever you may have with regard to – – decoys, whatever you may have with regard to commercial hunting activities.

. . . .

He also states, "provided further, [appellants] shall have the right to commercial hunt on said property during their lifetimes, to occupy and utilize the hunting lodge on said lands during their lifetimes, for personal use and in connection with their commercial hunting activities." Hunting rights are a separate interest in land. However, they do not equate with the mineral rights. The people who received absolute and fee simple title to this land, through this devise by Mr. LaCotts, also received hunting rights. There is no ambiguity with reference to that. There is no ambiguity with reference to what commercial hunting rights are. And it is clear that he did not make those hunting rights exclusive. He could have said so had he intended to do so. I can not look into his mind. I do not know for certain what his intent was. But I do know for sure that the right to hunt, the right to commercial hunt is not ambiguous and it was not necessary to make it unambiguous and it was not necessary to make it unambiguous for the will to provide they were either exclusive or joint. Those terms are not ambiguous.

> Consequently, it is the decision of the Court that this will be construed to mean that this bequeath include 109, you know the property I'm talking about; and further, that [appellants] have personal and commercial hunting rights on the property that are not exclusive, but are held jointly with the other fee simple owners of the property. And that the lodge located on the property where Mr. LaCotts's home is subject of their lifetime rights for utilization in connection with the commercial – – or personal hunting activities.
>
> I don't see any point in me elaborating further. I can if you – – it you want. [sic] For instance, in this – – in Paragraph II does provide [sic] that, "All parties will share equally in the maintenance and the upkeep of this property." That indicates to me that he intends that all parties have hunting and – – and – – have hunting rights on this property. Otherwise, he would be essentially saying that six grand-kids who do not have hunting rights will subsidize the right to commercial hunt and personal hunt of [appellants].

On August 23, 2005, the trial court entered an order dismissing appellant's petition to dismiss the petition for construction of the will. The trial court found that the description in exhibit A was not ambiguous and that the property vested in fee simple to the eight devisees. The trial court said that the fee ownership included hunting rights. The trial court also found that paragraph three was not ambiguous. It said that paragraph three did not grant appellants the exclusive hunting rights or the exclusive right to commercially hunt the property described in exhibit A. The trial court further found that all property not described in exhibit A, including the 160-acre tract, passed under the residuary clause of the will.

From that order, appellants now bring this appeal. We review probate proceedings de novo, but we will not reverse the trial court's decision unless it is clearly erroneous. *Jones v. Scott*, 92 Ark. App. 85, ___ S.W.3d ___ (2005). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

When reviewing the proceedings, we give due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Id*.

Appellants first argue that the trial court's failure to give effect to the prior agreed order was contrary to the doctrine of res judicata and clearly erroneous. Appellees counter appellants' argument by pointing out that appellants failed to obtain a ruling on this issue from the trial court. A review of the record reveals that this argument was made to the trial court but that the appellants failed to obtain a ruling on the matter. It is well settled that a party's failure to obtain a ruling precludes review of an issue on appeal. *See Batiste v. Ark. Dep't of Human Servs.*, 361 Ark. 46, ___ S.W.3d ___ (2005).

In their second argument on appeal, appellants argue that the trial court's construction of Mr. LaCotts's will concerning the real property devised in his will, particularly the 160-acre tract, was contrary to the testator's intentions and clearly erroneous because Mr. LaCotts's property was incorrectly described in his will. We disagree.

In the interpretation of wills, the paramount principle is that the intent of the testator governs. *Carpenter v. Miller*, 71 Ark. App. 5, 26 S.W.3d 135 (2000). The testator's intent is to be gathered from the four corners of the instrument itself. *Id*. However, extrinsic evidence may be received on the issue of the testator's intent if the terms of the will are ambiguous. *Harrison v. Harrison*, 82 Ark. App. 521, 120 S.W.3d 144 (2003). However, when a will specifically and unambiguously designates land located at one place, extrinsic evidence is not admissible to show the intention of the testator also to devise land situated

elsewhere that is not embraced in the description in the will. 80 AM. JUR.2D *Wills* §1135 (2006).

The question before us is whether there was an ambiguity in Mr. LaCotts's will. The trial court found that there was no such ambiguity and we agree. When we look at the face of the instrument there is no uncertainty as to what was meant. It clearly described what land was being conveyed and provided that any land that was omitted was to pass as part of the residue. Appellants are unable to demonstrate any uncertainty in the will. Accordingly, we hold that the trial court did not err when it found that there was no ambiguity in the will.

In their last argument on appeal, appellants argue that the trial court's construction of Mr. LaCotts's will concerning the appellants' right to commercially hunt and use and occupy a hunting lodge upon Mr. LaCotts's land was contrary to the testator's intentions and clearly erroneous because it failed to give effect to the recognized property rights devised to the appellants under the provisions of the will. Appellants are correct in their assertion that the right to hunt is a property right. *State v. Mallory*, 73 Ark. 236, 83 S.W. 955 (1904). However, they are mistaken as to what this right entails. As a general rule, the use of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy, or have in some manner the benefit thereof. *Galloway v. Sewell*, 162 Ark. 627, 258 S.W. 655 (1924). If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy, cultivation, or the rent which can be obtained from its use. *Id*.

As stated above, there was no ambiguity in Mr. LaCotts's will. The will clearly

provided that the parties were to "share and share alike." If we were to interpret the will as giving appellants superior rights to that of the appellees, then we would be stripping the appellees of their right to use the property. Furthermore, as the trial court stated from the bench, if in fact Mr. LaCotts had wanted to confer to the appellants rights that were superior to those of the appellees, then he could have employed language doing just that. Thus, we also hold that the trial court's construction of the will, as to appellants' right to commercially hunt and the use and occupancy of the hunting lodge, was not contrary to the intentions of the testator.

In sum, we hold that Mr. LaCotts's will was not ambiguous and affirm the trial court's decision.

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.